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No.

In the Supreme Court of the United States

October Term, 1984

LEATHERBY INSURANCE COMPANY, a/k/a WESTERN EMPLOYERS INSURANCE COMPANY,

Petitioner,

vs.

MERIT INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an appellant who discovers grounds for a motion under Rule 60(b) of the Federal Rules of Civil Procedure while its appeal is pending waive its right to an adjudication of the issues raised in its appeal if it seeks and obtains relief from judgment which is later reversed in a separate appeal?

2. Is an appellee obligated to defend the granting of relief from judgment by asserting grounds wholly unrelated to the Rule 60(b) proceeding, such that the failure to do so precludes a subsequent appeal on those grounds if the original judgment is reinstated?

3. Where an appeal is dismissed as a result of a successful Rule 60(b) motion made while the appeal is pending and where the Rule 60(b) relief is later reversed in a separate appeal, is a subsequent appeal which seeks an adjudication of the issues raised in the initial appeal "frivolous" as that term is used in Rule 38 of the Federal Rules of Appellate Procedure?

In accordance with Supreme Court Rule 28.1, petitioner Leatherby Insurance Company, now known as Western Employers Insurance Company, hereby states that 100% of its stock is owned by Western Employers, Inc., whose stock is wholly-owned by Continental Financial Services Company, which in turn is wholly-owned by The Continental Group, Inc., a publicly-held corporation. A detailed listing of Leatherby Insurance Company's affiliates is provided in Appendix N.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Leatherby Insurance Company ("LIC") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this action, dismissing LIC's appeal from the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 737 F.2d 580 (Appendix at 1-5). No opinions of the district court are reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1984. A timely petition for rehearing was denied on June 4, 1984, (App. at 22), and this petition for certiorari was filed within 90 days of that date.

STATUTES AND RULES INVOLVED

Rule 60(b)(6), Federal Rules of Civil Procedure:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . after the judgment, order, or proceeding was entered or taken.

Rule 38, Federal Rules of Appellate Procedure:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

This case arises from the efforts of petitioner Leatherby Insurance Company ("LIC") to obtain meaningful review of an arbitration award entered against it. On December 19, 1980, respondent Merit Insurance Company ("Merit") filed a petition in the District Court for the Northern District of Illinois to confirm an arbitration award in the principal amount of $10,675,000 against LIC. LIC filed a counterclaim to vacate, modify or amend the

award. The district court confirmed the award, and LIC appealed from that order to the United States Court of Appeals for the Seventh Circuit ("the 1981 appeal").

While the 1981 appeal was pending, LIC filed in the district court a motion for relief from that court's judgment under Fed. R. Civ. P. 60(b),* based on grounds not previously known to LIC nor presented to the district court. After a four-day evidentiary hearing, the district court entered an order setting aside its earlier judgment.**

Because the district court's action placed the case in an unclear procedural posture (discussed *infra*, pp. 6-8), LIC filed a motion before the court of appeals seeking, in the alternative, to dismiss the 1981 appeal as moot or to treat that action as a "certification" and remand the case for entry of a proper order by the district court. In response to LIC's motion, the court of appeals treated the district court's action as a "certification of the district court's determination that it is disposed to grant [LIC's] motion" and thereupon remanded the case. The court of appeals also ordered its Clerk to "dismiss the appeal" after notification that the district court had re-entered its orders setting aside its earlier judgment (7th Cir. Order, App. at 25).

The district court subsequently re-entered its orders (Dist. Ct. Order, App. at 30). Thereupon, the 1981 appeal was dismissed (7th Cir. Order, App. at 26). Merit appealed from the re-entered orders ("the 1982 appeal"). The court of appeals reversed and ordered reinstatement

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* LIC's motion was deemed by the district court and by the court of appeals to have been brought under subsection (6) of Rule 60(b).

** The district court vacated both its earlier judgment confirming the arbitration award and the arbitration award itself. (Dist. Ct. Order. App. at 29).

by the district court of the arbitration award and the judgment confirming it. *Merit Insurance Co.* v. *Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983). LIC sought but was denied a writ of certiorari with respect to that judgment in Docket No. 83-653, 104 S.Ct. 529 (Dec. 5, 1983).

Upon remand, the district court entered judgment "nunc pro tunc" as of November 19, 1981 for Merit on the original arbitration award (Dist. Ct. Order, App. at 6). LIC thereafter filed a timely post-judgment motion based in part on the grounds of LIC's original attack on the arbitration award, which grounds had been raised but never resolved in the 1981 appeal. On March 16, 1984, the district court denied LIC's motion.

LIC promptly appealed the original judgment and the denial of its new post-judgment motion ("the 1984 appeal"). Merit moved to dismiss. The court of appeals granted Merit's motion, holding that LIC had voluntarily abandoned the 1981 appeal and could not revive the issues originally raised in that appeal (7th Cir. Opn., App. at 3-4). The court of appeals thus denied to LIC any review of the issues which had been the subject of the 1981 appeal.*

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* LIC raised in the 1981 appeal the following issues which have never received appellate review: (1) because of the unique and complex nature of the case, the arbitrators' failure to make findings or otherwise to explain the reasons for their award deprived LIC of due process of law and was in violation of the Federal Arbitration Act's requirement that awards must be "mutual and definite" (9 U.S.C. § 10(d)); (2) the arbitrators manifestly disregarded the New Jersey law they were obligated to follow by failing to make a pro rata setoff against the award for a settling joint tortfeasor's pro rata share; (3) Merit committed fraud in supporting its damage claim; and (4) the district court's denial of LIC's request to prove its claim of fraud in an evidentiary hearing was error.

REASONS FOR GRANTING THE WRIT

This petition arises out of the deprivation of the right of a party to have an appellate resolution of its challenge to an arbitration award in excess of $10,000,000. As described in more detail below, LIC adhered to the judicially sanctioned procedure to be followed when prosecuting a post-judgment motion seeking to set aside a district court judgment while an appeal from that judgment is pending. Because LIC's post-judgment motion was successful before the district court, the initial appeal was, quite properly, dismissed—the judgment appealed from no longer existed—and the merits of that appeal were never reached by the court of appeals. After further proceedings resulted in reinstatement of the original judgment adverse to LIC, however, LIC sought in 1984 to press the issues which had been the subject of the initial appeal. The court of appeals dismissed LIC's 1984 appeal, holding that the dismissal of the initial appeal forever precluded appellate resolution of those issues.* This action by the court of appeals flies in the face of procedures established in the majority of circuits, creates an unworkable and unsupportable rule of appellate practice and is in conflict with recent decisions of the Fifth and Tenth Circuits and prior decisions of the Seventh Circuit.

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* The court of appeals also labelled LIC's 1984 appeal "frivolous" and ordered LIC to pay Merit's reasonable attorney's fees "for Merit's efforts in [the court of appeals] to dismiss [the] appeal. . . ." (7th Cir. Opn., App. at 5).

I.

AN APPELLANT WHO DISCOVERS GROUNDS FOR A MOTION UNDER RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHILE ITS APPEAL IS PENDING DOES NOT WAIVE ITS RIGHT TO AN ADJUDICATION OF THE ISSUES RAISED IN ITS APPEAL IF IT SEEKS AND OBTAINS RELIEF FROM JUDGMENT WHICH IS LATER REVERSED IN A SEPARATE APPEAL.

While LIC's 1981 appeal was pending and LIC learned for the first time of substantial grounds for a Rule 60(b) motion, LIC sought to follow the "more satisfactory" and "preferable" procedure established by the Seventh Circuit and a majority of other courts of appeals for the disposition of such a motion when an appeal is pending. 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2873, pp. 265-66 (1973). That is,

> during the pendency of an appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, application then can be made to the appellate court for a remand.

Id., p. 265 (footnote omitted). *See Puerto Rico* v. *S. S. Zoe Colocotroni,* 601 F.2d 39, 42 (1st Cir. 1979), *cert. denied,* 450 U.S. 912 (1981); *Lairsey* v. *Advance Abrasives Co.,* 542 F.2d 928, 932 (5th Cir. 1976); *First National Bank* v. *Hirsch,* 535 F.2d 343, 345 (6th Cir. 1976); *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.,* 281 F.2d 252, 260-61 (7th Cir. 1960), *cert. dismissed,* 366 U.S. 211 (1961); *Pioneer Insurance Co.* v. *Gelt,* 558 F.2d 1303, 1312 (8th Cir. 1977); *Aune* v. *Reynders,* 344 F.2d 835, 841 (10th Cir. 1965); *Garcia* v. *Regents of the University of California,* 737 F.2d 889 (10th Cir. 1984); and *Smith* v. *Pollin,* 194 F.2d 349, 350 (D.C. Cir. 1952). The effect of this procedure is to expedite the ultimate disposition of cases by affording the appellant-movant the opportunity to obtain relief from the district court and avoid prosecution of what may be an unnecessary appeal. More important for purposes of the

questions presented by this petition, this procedure is designed to preserve the issues raised in the initial appeal "unless the appellant indicates a clear intent to abandon the original appeal." *Garcia, supra.*

Accordingly, after the district court held an evidentiary hearing on LIC's Rule 60(b) motion and granted the motion without first certifying to the court of appeals its intention to do so and awaiting remand of the case to the district court, LIC moved in the court of appeals, in the alternative, to dismiss the 1981 appeal as moot or to remand the case to the district court. The court of appeals construed the district court's orders as "a certification of the district court's determination that it is disposed to grant the motion" and ordered the case remanded so that the orders of the district court could be re-entered (7th Cir. Order, App. at 25). Significantly, the court of appeals also ordered that the dismissal of the appeal occur *after* notification that the district court had re-entered its orders. Following the re-entry of the district court's orders, the 1981 appeal was dismissed (7th Cir. Order, App. at 26).

When LIC sought to reassert in 1984 the issues raised in the previously-dismissed 1981 appeal, the appellate court held that these events constituted a voluntary dismissal of the 1981 appeal with the effect that LIC abandoned any right to obtain review of the district court's original judgment* (7th Cir. Opn., App. at 3-4). Yet LIC did

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* The court below referred to the dismissal of the 1981 appeal no less than seven times (App. at 2, 3, 4), in most cases noting that the dismissal was at the instance of LIC. The court of appeals found the 1984 appeal to be "frivolous" and went so far as to award Merit attorney's fees under Fed. R. App. P. 38 (App. at 5). Apart from committing the fundamental errors of law detailed herein, the court of appeals was under the misapprehension that LIC had voluntarily abandoned the 1981 appeal *before* the remand. *See* App. at 4 and the court's similar erroneous statements in the 1982 appeal, 714 F.2d at 677.

precisely what was required under the cases cited above at p. 6.

A party learning of grounds to support a post-judgment motion under Rule 60(b) *must* make the motion promptly or risk losing the right to do so. Once such a motion is made, the district court *must* hear the motion even though the case is on appeal. *See, e.g., Binks, supra,* 281 F.2d at 260. If the district court certifies that it is disposed to grant the motion, the case may be remanded. *Id.* If after remand the Rule 60(b) motion is then granted, the judgment appealed from will necessarily be vacated and the initial appeal *must* then be dismissed. To hold that one who follows the *mandated* procedure, as LIC did here, "voluntarily" loses all right to challenge the original judgment, should it later be reinstated, is unconscionable.

The "dismissal" of the 1981 appeal was simply not a dismissal with any of the results that flow from abandoning an appeal while the judgment appealed from is still in existence.* Had LIC not moved promptly to pursue its Rule 60(b) motion, it might well have lost the right to do so. It is a total perversion of the procedure established by the cited cases to, in effect, force the appellant to choose between an appeal and a post-judgment motion, surrendering forever the alternative not chosen.

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* The submissions by both LIC and Merit before the court of appeals in connection with the dismisal of the 1981 appeal contemplated that that appeal could be revived if Merit prevailed on what became the 1982 appeal. (*See* p. 15, *infra.*)

II.

AN APPELLEE IS NOT OBLIGATED TO DEFEND THE GRANTING OF RELIEF FROM JUDGMENT BY ASSERTING GROUNDS WHOLLY UNRELATED TO THE RULE 60(b) PROCEEDING, SUCH THAT THE FAILURE TO DO SO PRECLUDES A SUBSEQUENT APPEAL ON THOSE GROUNDS IF THE ORIGINAL JUDGMENT IS REINSTATED.

The court of appeals took the extraordinary position that LIC as appellee in the 1982 appeal should have raised —in defense of the district court's order setting aside the earlier judgment confirming the arbitration award—the claims that formed the basis of LIC's 1981 appeal attacking that judgment. The opinion stated in pertinent part:

> [LIC] argues, however, that this is the first opportunity it has had to get appellate review of the district judge's order denying its November 19, 1981, motion. . . . This is not true. . . . [W]hen Merit appealed from the district court's order setting aside the arbitration award on the ground of bias of the neutral arbitrator, [LIC] was of course free to defend that order on any ground it wished [7th Cir. Opn., App. at 4].

The court then leapt to the unsupportable conclusion that if an appellee *may* raise an argument to support the judgment below, it *must* do so or forever lose the right to raise that issue.

This conclusion is wrong for reasons of policy and precedent. First, LIC could not have cross-appealed in Merit's 1982 appeal, for there was no extant adverse judgment or finding from which LIC could have cross-appealed. Second, it is inconsistent and illogical to hold that an appellee *must* (not "may" but "must") raise issues going

to the impropriety of a non-existent judgment, from which no appeal or cross-appeal is jurisdictionally possible, in the context of defending an order setting aside the judgment on wholly unrelated grounds.* To the extent that competing theories of judicial efficiency are implicated here, the choice has already been made by the courts in the cases cited at page 6, *supra*. Those decisions required dismissing the 1981 appeal, in effect, without prejudice. Moreover, the rule applied below would require all parties to brief numerous issues prematurely and at considerable, and perhaps unnecessary, expense.

Second, the court of appeals' reliance on *Raxton Corp.* v. *Anania Associates, Inc.*, 668 F.2d 622 (1st Cir. 1982), the sole case cited by it, was misplaced. There, a district court had made a crucial finding of fact against plaintiff on one theory but dispositively ruled in its favor on a separate theory. Because plaintiff took no cross-appeal from, nor otherwise challenged, the adverse finding, "it became established as the law of the case and [plaintiff] forfeited the right to challenge it during the subsequent litigation of this controversy." 668 F.2d at 624. The distinction between *Raxton* and the instant case is a material one, for here there was no extant judgment, finding or conclusion of law against LIC. At most, only a finding of

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* Here, for example, several of LIC's claims in the 1981 appeal could not have been asserted to "defend" the district court's order setting aside the arbitration award as void *ab initio*. One of LIC's grounds for the 1981 appeal was the denial of an evidentiary hearing before the district court on LIC's claim that the award was procured by fraud perpetrated by Merit. LIC also sought a remand to the arbitrators (a) for clarification of what disposition, if any, was made of the claims and defenses LIC had raised, and (b) for issuance of findings of fact and conclusions of law that could be meaningfully reviewed. Neither of these grounds is as such directly supportive of the 1982 total vacatur of the award.

fact in an *existing* judgment can become the law of the case through failure to challenge it. As this Court has held, the law of the case is only that which *was* decided by the appellate court, and not that which *might* have been decided. *Hartford Life Insurance Co.* v. *Blincoe*, 255 U.S. 129, 136 (1921).

Thus, the ruling below imposes unprecedented and wasteful, not to mention illogical, burdens on parties to an appeal from a successful post-judgment motion.

III.

THE DECISION BELOW IS IN CONFLICT WITH RECENT DECISIONS OF THE FIFTH AND TENTH CIRCUITS AND PRIOR DECISIONS OF THE SEVENTH CIRCUIT.

Assuming *arguendo* that LIC was, as the court below asserted, "free to defend [the district court's vacatur] order" by raising its challenges to the non-existent confirmation order, the issue here is whether LIC was *obligated* (not merely "free") to raise them as appellee, such that the failure to do so would constitute a permanent waiver of those challenges.

In a recent case with a complex procedural history strikingly parallel to this case, the Fifth Circuit reached a result directly contrary to that of the court below here. In *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981), judgment had been entered for defendant on a jury verdict. Plaintiffs filed a motion for a new trial based on two grounds. The district court granted the motion based on one ground and did not reach the second ground. On retrial, the jury found for plaintiffs. Defendant appealed from the judgment on the verdict, contending that it had been error to grant the new trial.

On that appeal, plaintiffs-appellees did *not* seek to support the grant of the new trial on the basis of the second, unresolved ground urged below although they plainly could have done so. The court of appeals reversed, finding that the new trial should not have been granted, and directed entry of judgment for defendant.

After entry of judgment, plaintiffs moved for a new trial on the ground which the district court had not reached on the prior motion and a new trial was granted. On an interlocutory appeal, the court of appeals held that the district court properly entertained the motion, even though the ground underlying it could have been urged on the prior appeal in support of the prior judgment.* The *Conway* court held:

> [T]he law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided on the prior appeal. The law of the case doctrine "does not include all questions which were present in a case and which might have been decided but were not."

Conway, 644 F.2d at 1062, quoting *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Thus, for the Fifth Circuit, the fact that an appellee *may* raise an issue does not mean that he *must* do so or forever lose the opportunity to assert that issue.

A recent decision of the Tenth Circuit, although not involving the lengthy procedural history of the instant case or of *Conway*, stands for the proposition that the procedure set forth in the cases cited *supra* at p. 6 and followed by LIC here is designed to preserve, not to destroy, the right to appeal the initial judgment. In *Garcia*

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* Plaintiffs ultimately prevailed on the merits. *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108 (5th Cir. 1982).

v. *Regents of the University of California*, 737 F.2d 889 (10th Cir. 1984), the Tenth Circuit Court of Appeals endorsed the procedure described above as the one to be followed "when a party whose appeal is pending seeks to raise issues appropriately first raised by a Rule 60(b) motion . . . ." Significantly, this procedure was chosen by that court over other alternatives so that the "appellant did not . . . lose the issues raised in the primary appeal while seeking to preserve new issues to be raised on [the] 60(b) motion." This procedure should be followed "unless the appellant indicates a clear intent to abandon the original appeal." The decision below, holding that adherence to the preferred procedure can result in total abandonment of the issues raised in the initial appeal, notwithstanding the absence of any manifest intent to achieve that result, thus conflicts with a stated goal of the procedure.

Another authority—and one directly contrary to *Raxton*—is the Seventh Circuit's own decision in *Drinan* v. *A.J. Lindemann & Hoverson Co.*, 238 F.2d 72, 74 (7th Cir. 1956). In *Drinan*, the defendant had prevailed on a motion to dismiss, although on one of the grounds urged, the district court had ruled against defendant. On the first appeal, defendant did not assert the rejected ground as a basis for affirming the judgment below. The court of appeals reversed the dismissal. After a judgment on the merits was entered for the defendant, plaintiff appealed. Defendant urged as a basis for affirmance the ground not previously presented to the court of appeals. That court held for the defendant on that ground. The failure to present one of the defenses on the first appeal, even though it could have been raised by defendant-appellee at that time, did not preclude raising the issue on the second appeal. *See also Connett* v. *City of Jerseyville*, 110 F.2d

1015, 1018 (7th Cir. 1940) ("federal courts recognize that the law of the case does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided").

Therefore, the principles expressed in and the result of the opinion below are at odds with a recent decision of the Fifth Circuit squarely in point, prior decisions of the Seventh Circuit and the rationale of a recent Tenth Circuit decision.

IV.

WHERE AN APPEAL IS DISMISSED AS A RESULT OF A SUCCESSFUL RULE 60(b) MOTION MADE WHILE THE APPEAL IS PENDING AND WHERE THE RULE 60(b) RELIEF IS LATER REVERSED IN A SEPARATE APPEAL, A SUBSEQUENT APPEAL WHICH SEEKS AN ADJUDICATION OF THE ISSUES RAISED IN THE INITIAL APPEAL IS NOT "FRIVOLOUS" AS THAT TERM IS USED IN RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

When it dismissed LIC's 1984 appeal, the court of appeals, *sua sponte*, ordered LIC to pay reasonable attorney's fees for "Merit's efforts . . . to dismiss this frivolous appeal" (7th Cir. Opn., App. at 5), even though Merit never sought damages under Rule 38. Not only is it a rare case where attorney's fees are awarded pursuant to Rule 38 in the absence of a motion by the appellee, *see Ruderer* v. *Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980), it is only in extreme circumstances, which simply are not present here, that an award under Rule 38 is even appropriate.

In order to assess damages against an appellant pursuant to Rule 38, a court must find "some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the

district court's judgment or for the purpose of delay or harrassment or out of sheer obstinancy." *Ruderer*, 614 F.2d at 1132. In this case, both parties—at an earlier stage in the proceedings—expressly contemplated that the issues in the 1981 appeal could eventually be reviewed in the appellate court. For example, following the dismissal of the 1981 appeal, Merit moved the court of appeals to vacate its dismissal order and to consolidate its consideration of the issues in the 1981 appeal with the issues Merit would raise in its 1982 appeal. Merit urged that its request would promote "judicial economy and orderly procedure," arguing that if the district court's grant of LIC's Rule 60(b) motion were reversed by the appellate court (as it in fact later was), "then the case will be precisely in the same posture it was prior to the allowance of the 60(b) motion. It is fair to assume that Leatherby will once again pursue the appeal now pending in this cause." (Merit's Motion to Vacate Orders and For Other Relief, filed November 30, 1982 at pp. 2-3). Thus, Merit's motion contemplated and was expressly based upon LIC's right to bring its 1984 appeal.

LIC also acknowledged the likelihood of reinstituting its appeal in the event the district court's grant of Rule 60(b) relief were overturned. In its Memorandum in Opposition to Merit's Motion to Vacate, filed December 13, 1982, LIC stated, contrary to Merit's view, that:

> If Merit were to succeed in [the 1982 appeal] and the arbitration award were to be reinstated, no duplication of efforts or waste of judicial resources would occur. If LIC were again to appeal from the arbitration award, the briefs prepared for [the 1981 appeal] could be used again.

Thus, each side anticipated that no rights were abandoned by the appellate court's dismissal of the 1981 appeal.

Later, Merit changed its position and challenged LIC's right to raise the issues previously raised but not decided in the 1981 appeal. Before the district court, Merit sought to preclude LIC from pursuing its 1984 post-judgment motion, arguing that it was being prosecuted in bad faith and for delay. The district court—whose involvement with this case spans almost four years—unequivocally rejected Merit's claim, and made an explicit finding that LIC was not engaged in any delaying tactics, stating:

> I will not accept that anything done by Leatherby was for the purpose of delay or was dilatory or that was the motivation. I think whatever I considered here was done because they thought they had a legitimate contention. [Transcript of March 15, 1984 proceedings at p. 7].

Further, the district court addressed LIC's right to reassert the 1981 appeal and to appeal the denial of its 1984 motion for relief from judgment and concluded that "I think there is no question that you [LIC] have a right to appeal probably both. . . ." (Transcript of March 16, 1984 proceedings at pp. 8-9).

Given the expressed expectations of the parties, the statements of the district court, the logical implications of the procedure prescribed by *Binks*, and the absence of any case law to the contrary, there can be no doubt that LIC reasonably and in good faith believed that it had a right to bring its 1984 appeal. There is simply no basis for a determination that LIC's appeal was "frivolous" within the meaning of Rule 38.

CONCLUSION

In dismissing LIC's 1984 appeal, the court of appeals misapprehended both the complex procedural history of this case and the judicially sanctioned basis for the 1984 appeal. The court of appeals' decision conflicts with recent decisions of the Fifth and Tenth Circuits and with prior decisions of the Seventh Circuit. In any event, the award of damages under Rule 38 is ill-founded. For these reasons, LIC respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals in this action.

Dated: August 30, 1984

Respectfully submitted,

MITCHELL S. RIEGER*
ALLAN HORWICH
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000
Attorneys for Petitioner

Of Counsel:
WILLIAM M. HANNAY
BARBARA E. HERMANSEN
SCHIFF HARDIN & WAITE

* Counsel of Record

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1427

MERIT INSURANCE COMPANY,

Plaintiff-Appellee,

v.

LEATHERBY INSURANCE COMPANY, a/k/a
WESTERN EMPLOYERS INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 6758—Charles P. Kocoras, *Judge.*

SUBMITTED APRIL 20, 1984—DECIDED MAY 4, 1984

Before CUMMINGS, *Chief Judge,* POSNER, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

PER CURIAM. We have before us a motion to dismiss the appeal filed by Leatherby Insurance Company from an order denying a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the judgment in favor of Merit Insurance Company.

In December 1980 a panel of three arbitrators, at the conclusion of an arbitration proceeding that had lasted three years, awarded Merit more than $10 million for

fraud committed by Leatherby. In December 1981 the district court entered judgment confirming the award, and also denied Leatherby's motion under Rule 60(b), which had been made on November 19, 1981, to vacate that judgment on the ground that the award was in manifest disregard of the law and also had been procured by misrepresentations made to the arbitration panel by Merit. On December 17, 1981, Leatherby appealed to this court from both the judgment confirming the award and from the order denying its Rule 60(b) motion. On May 12, 1982, while the appeal was pending, Leatherby filed another Rule 60(b) motion in the district court, alleging that the neutral arbitrator had been biased. When the district court indicated that it was favorably disposed toward this motion, we dismissed the appeal at Leatherby's request. The district court then set aside the arbitrators' award, Merit appealed, and on July 12, 1983, we reversed and ordered the district court's original judgment confirming the award reinstated. 714 F.2d 673 (7th Cir. 1983). After other proceedings unnecessary to recount here, Leatherby on March 15, 1984, filed another Rule 60(b) motion in the district court (its third), based in part on the same grounds as its first 60(b) motion, which the district court had denied back in 1981, and as to which Leatherby's appeal had been dismissed at its own request when the district court indicated that it would grant Leatherby's second Rule 60(b) motion. The district court denied Leatherby's renewed 60(b) motion on March 16, 1984, Leatherby filed a notice of appeal, and Merit has now moved to dismiss the appeal. Both parties have briefed Merit's motion extensively.

On its face, the appeal is frivolous. For the most part it seeks to bring up to us the identical issues that were the subject of an appeal filed by, and later dismissed on

motion of, the appellant itself. For the Rule 60(b) motion which Leatherby filed on March 15, 1984, and from the denial of which it is appealing, is virtually identical to the Rule 60(b) motion which it had filed on November 19, 1981, which had been denied then, and from the denial of which Leatherby had prosecuted, and then dismissed, an appeal. Indeed, the March 15 motion incorporates the motion of November 19, 1981, by reference. The only new thing is affidavits from the party arbitrators, but they were part of the record that was before the district court when it was considering Leatherby's second Rule 60(b) motion (the one it granted) and also part of the appellate record on which we based our decision for Merit in July 1983. They provide no conceivable basis for reopening the case, either on the ground of newly discovered evidence or on any other ground listed in Rule 60(b). The March 15 motion does not even indicate the subsection of Rule 60(b) under which it is filed. The motion was filed either to delay the final day of reckoning when Leatherby has to pay the judgment that has been entered against it, or simply to revive the appeal that we dismissed on Leatherby's motion two years ago. No intervening change in law could justify this attempt to renew a long-dismissed appeal. If anything, our decision of July 12, 1983, rejecting Leatherby's challenge to the impartiality of the neutral arbitrator, by making clear that the test for setting aside an arbitration award on grounds of bias of an arbitrator is a demanding one, weakened the basis for Leatherby's challenge to the impartiality of the party arbitrators, a challenge which in any event Leatherby could and should have made literally years ago when it challenged the good faith of the neutral arbitrator. A surprising feature of the March 15 motion is that it does not even discuss the

bearing of our July 12 decision on the motion; it is as if nothing had happened between November 19, 1981, and March 15, 1984.

Leatherby argues, however, that this is the first opportunity it has had to get appellate review of the district judge's order denying its November 19, 1981, motion. (In so arguing, it makes clear that there is nothing really new in the March 15 motion; the motion is basically just a vehicle for reinstating the dismissed appeal from the denial of Leatherby's Rule 60(b) motion of November 19, 1981.) This is not true. What is true is that in order to get the district judge to rule on its second motion, Leatherby had to dismiss its appeal from the first motion, because while that appeal was pending the district court had no jurisdiction over the case. But when Merit appealed from the district court's order setting aside the arbitration award on the ground of bias of the neutral arbitrator, Leatherby was of course free to defend that order on any ground it wished. For Leatherby to take two bites at the apple, by waiting to see how it fared in defending the district court's grant of its second Rule 60(b) motion before deciding whether to attack the district court's denial of its first motion, and then, after losing in this court, making that denial the subject of another appeal, is an abuse of orderly appellate procedure. See, e.g., *Raxton Corp.* v. *Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir. 1982). We shall tolerate no further delay in winding up this protracted litigation, which has made a mockery of the promise of arbitration to give those who choose it a swift and effective alternative to judicial dispute resolution.

The motion to dismiss the appeal is granted, and the appeal is dismissed. Pursuant to Rule 38 of the Federal Rules of Appellate Procedure, we order Leatherby to pay Merit a reasonable attorney's fee for Merit's efforts in this court to dismiss this frivolous appeal, the amount of the fee to be determined by the district court.

So Ordered.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date March 7, 1984

Title of Cause—Merit Insurance Co. v. Leatherby Ins. Co., a/k/a Western Employers Ins. Co.

Brief Statement of Motion—Suggesting Filing of Mandate and to Enter Judgment.

Names and Addresses of moving counsel—

Charles J. O'Laughlin and JENNER & BLOCK, One IBM Plaza, Chicago, Il 60611

Representing—MERIT INSURANCE COMPANY

SCHIFF, HARDIN & WAITE, 233 S. Wacker Dr., Chicago, 60606

Representing—Leatherby Ins. Co.

Plaintiff's motion for entry of judgment is granted. Enter order of judgment against defendant and in favor of plaintiff in the amount of $11,500,923.00 plus costs. Judgment is entered nunc pro tunc as of November 19, 1981. (DRAFT)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MERIT INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Docket No.
	)	80 C 6758
LEATHERBY INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

Chicago, Illinois
March 16, 1984
2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Charles P. Kocoras

Appearances:

For the Plaintiff: Messrs. Jenner & Block

By: Mr. Charles J. O'Laughlin
One IBM Plaza
Chicago, Illinois 60611

For the Defendant: Messrs. Schiff, Hardin & Waite

By: Mr. Mitchell S. Rieger
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

THE CLERK: 80 C 6758, Merit Insurance Company vs. Leatherby Insurance Company. Ruling on defendant's motion to vacate.

MR. RIEGER: Good afternoon.

MR. O'LAUGHLIN: Good afternoon, your Honor.

THE COURT REPORTER: Do you want to both state your names for the record?

MR. O'LAUGHLIN: Charles O'Laughlin for Merit Insurance Company.

MR. RIEGER: Mitchell Rieger for Leatherby Insurance Company.

THE COURT: That is just for the record. Joene recognizes you instantly on sight now.

All right. Here is the ruling:

Leatherby has moved pursuant to Rule 59, or in the alternative Rule 60(b), to alter, amend or vacate the judgment that was entered on March 7th following remand from the Seventh Circuit.

Leatherby argues that the judgment confirming the arbitrators' award must be set aside because there was a manifest disregard of the law on the part of the arbitrators during their deliberations on the amount of the award.

Leatherby has made the same argument to me before, but I was not then persuaded. I confirmed the arbitrators' award and denied Leatherby's motion to vacate or amend the award in late 1981. In the two years that followed, the question of whether the award could stand in the face of evidence that one of the arbitrators had intentionally concealed a significant relationship with one of the parties to the arbitration, was litigated all the way to the Supreme Court. Not quite as far as the Supreme Court, as Mr. Rieger

would have liked, but at least they had a chance to look at it.

After the Court denied certiorari, that controversy finally was resolved against Leatherby and the original judgment confirming the award was reinstated.

Leatherby now points to the two affidavits that were generated during the controversy having to do with the arbitration, and renews its argument that the arbitrators did not follow the law—the applicable law—in setting the amount of the award. These affidavits were supplied by two of the arbitrators for the purpose of demonstrating that the third arbitrator—the one who intentionally concealed his prior relationship, as I previously found—had conducted himself in an unbiased manner.

In other words, it was the function of these affidavits to show that the third arbitrator was completely neutral and that the result of the arbitration was not influenced by the prior relationship that he had taken pains to conceal. In carrying out that function, both affidavits make passing reference to the arbitrators' deliberations.

Leatherby now says that those references provide "a window through which to view the manner in which the arbitrators arrived at their award". I cannot help but say that you would call that a window of vulnerability, not unlike the expression used by our chief executive sometime ago having to do with other matters. But in any event, that is the essence of it.

I am unable to agree that these affidavits are as valuable as Leatherby believes they are, or wants me to believe they are. Leatherby suggests, in essence, that I should find on the basis of some tangential references to the arbitrators' deliberative process that their reasoning with respect to the amount of the award was fatally flawed

from the outset by a failure to apply the correct legal principles.

This "window" into the arbitrators' minds, as Leatherby calls it, is not nearly that wide. This becomes even more apparent when it is recalled that these affidavits were not prepared with a view towards detailing the arbitrators' deliberations, but only to show that the third arbitrator was not biased.

It also is important to recall what the Seventh Circuit had to say in this case. Arbitration is a method of dispute resolution quite different in many respects from litigation in a court of law. It has certain benefits as well as certain disadvantages over litigation in the more formal setting of the legal system.

The parties in this case, who could have brought their dispute to a court in the first instance, weighed the advantages and disadvantages and freely selected arbitration as the method by which to settle the controversy between them. In such circumstances, a court called upon to review the arbitration should be extremely hesitant to freely probe the minds and thought processes of the arbitrators to ensure that their reasoning was sound.

While it might be correct in particularly egregious circumstances for a court to engage in such dissection of the arbitrators' deliberations, it would only be proper when the evidence of error in the deliberations was vastly stronger than the thin evidence upon which I have been asked to infer error in this case.

Some of the cases say that the party seeking to set aside the award must show more than a mistake of law or a failure by the arbitrators to comprehend the law. Instead, it is said, it is necessary to establish that the arbitrators fully understood the applicable law and correctly

stated it, but nevertheless proceeded to ignore it. That has not been established by the affidavits Leatherby relies on. In my opinion, these affidavits do not come close to making the strong showing that is required.

Accordingly, I conclude the [sic] Leatherby has not made a showing that warrants relief under either Rule 59 or Rule 60, and I deny its motion. Even though I recognize you have asked an alternative—that I have a hearing on it—I do not believe there is a present basis for me to order a hearing, and I deny the motion in all its respects.

MR. O'LAUGHLIN: Thank you, your Honor.

MR. RIEGER: Thank you, your Honor.

If the Court please, as I indicated yesterday, we will be filing a notice of appeal this afternoon. I think I was erroneous in saying today was the tenth day. I think the judgment was entered on March 7th, which would make tomorrow the tenth day; but nevertheless, I—

THE COURT: I do work on Saturdays, but I am not here in open court. So, it is just as well that we took care of it today.

MR. RIEGER: Right.

Now, I would suggest to your Honor that in accordance with local Rule 28 on supersedeas, the rule says a supersedeas bond where the judgment is for a sum of money only, it shall be in the amount of the judgment—which is $11,500,293—plus 11% to cover interest and such damages for delay as may be awarded, plus $250.

That calculation comes out to $12,766,274.

MR. O'LAUGHLIN: If the Court please, I would like to make a threshold inquiry as to what he is appealing. Certainly, he is not appealing a judgment which this Court

entered pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit. I can't imagine anything more—a greater folly or, indeed, contemptuous than going back to the same court which directed that that judgment be entered. I can see no basis upon which the judgment entered by this Court on March 7th is appealable.

I can see that he can appeal perhaps the Court's ruling today, but not the judgment.

MR. RIEGER: If the Court please, when you entered a judgment on November 19th, 1981, as a matter of right we had a right to appeal it—which we did. Prior to the decision of the Court of Appeals—and there was actually an oral argument in this case—the decision did not come forward and your Honor set aside the judgment and the appeal was dismissed because it was moot.

I have the orders of the Court of Appeals here. As a matter of fact, Merit Insurance Company moved the Court of Appeals to vacate its order of dismissal. The Court denied that, and I have that minute order here, too.

I do not understand how we are contemptuous if we seek to appeal, as a matter of right, a judgment which has not been appealed before. Counsel seems to forget that the first appeal was dismissed because it was moot, since your Honor had dismissed and vacated your earlier award.

What has now happened is we are back at November 19, 1981. You have reinstated, by direction, the judgment that had been vacated. That does not mean we suddenly lose our right to appeal.

MR. O'LAUGHLIN: If the Court please, there is one order to this Court emanating from the Seventh Circuit. That is, that you enter the judgment. That is the only order. That is the law of the case. That appeal was dismissed on their motion, if the Court please.

THE COURT: Well, let me ask you this. You will all have to decide what the appeal is from. I have reinstated the judgment and I have not [sic] denied a motion to alter or vacate or modify in some way that judgment; and there is going to be an appeal, I assume, both as to the original judgment—

MR. RIEGER: Yes, as to the judgment and as to today's order.

THE COURT: As to today's order?

MR. RIEGER: Yes, sir.

THE COURT: I was wrong to reinstate the judgment or reconfirm what I had originally done way back when in this case, and now I am making a second mistake by not recognizing the first mistake in setting it aside. I do not know how many mistakes I have made in this case, but I know of one the Court of Appeals has pointed out. So, I will accept that.

Now, you will have to figure out what the correct procedural posture has to be. I think there is no question that you have a right to appeal probably both, although I am not going to be the expert and try and divine how it is going to look like upstairs, but what I do not intend to do is stay the effect of the judgment because I do not think the criteria are present in this case for that. So, I am not really sure what I am being asked to do here.

MR. RIEGER: I am asking your Honor to set a supersedeas bond, the amount of which—while it is on appeal, that is what I was referring to, your Honor. A supersedeas bond.

MR. O'LAUGHLIN: I don't think your Honor can enter an order supersedeas, and I don't think that judgment can be superseded. That is my statement.

THE COURT: Well, it seems to me the amount of the bond does not have to be in the amount—

MR. O'LAUGHLIN: The amount of the bond—

THE COURT: It is going to have to be at least the amount of the—

MR. RIEGER: The amount of the judgment, plus 11%, plus $250.

THE COURT: So, you are talking about $12 million?

MR. O'LAUGHLIN: Your Honor, I have different figures than this. It wouldn't at all surprise you.

MR. RIEGER: May I finish my comments?

The figure I gave your Honor was $12,766,000.

THE COURT: You are both in that ballpark now. Another week and we will be at $13 million.

MR. O'LAUGHLIN: I am right now at $13,876,000.32.

THE COURT: So, he is already there. Okay.

Is the argument over the right amount of the bond or is it the question of whether I should set any bond in the first instance?

MR. RIEGER: Well, I am asking you to set a bond, your Honor. I think the amount of the bond should bet set in accordance with the rule of the court. That is Rule 28 of this district court. Apparently, Mr. O'Laughlin is raising two questions.

The Court: All right. Tell me, Mr. O'Laughlin, what you are—

MR. O'LAUGHLIN: I am saying that the judgment entered by this Court, docketed on March 7th, is not appealable; that there is no jurisdiction to grant supersedeas.

THE COURT: Why do you say it is not appealable? Because of what happened in the—

MR. O'LAUGHLIN: Because your Honor entered it pursuant to the mandate of the Seventh Circuit. You had, in all due deference, no alternative but to do that. That is the law of the case.

THE COURT: Well, it may be the law of the case if they decided the question on which he is appealing, which is whether or not the arbitrators did or did not abuse New Jersey law. That is the essence of your argument; is it not?

MR. RIEGER: Yes.

THE COURT: That question, frankly—

MR. O'LAUGHLIN: No, not at all. The mandate of the Seventh Circuit says to Judge Kocoras, "Reinstate the judgment, November 19, 1981."

THE COURT: Right, and I did "period".

MR. O'LAUGHLIN: You did just that, dutifully.

THE COURT: Right. The question, however, is you say he has no right to appeal—

MR. O'LAUGHLIN: Right.

THE COURT: Now, the reinstatement of that judgment on grounds that the arbitrators ignored and misapplied the applicable law in this case, which happens to be New Jersey law, that is what you are appealing on.

MR. RIEGER: Manifest disregard of the law.

THE COURT: Right. That issue has never been addressed by the Court of Appeals.

MR. O'LAUGHLIN: On whose motion, your Honor, it was not addressed? Certainly it was, if the Court please—

that if Leatherby wanted to put any of those grounds as part of their appeal, they surely could have. The record was complete. No reason on earth why they couldn't. They chose not to, if the Court please; and as I said yesterday, we know about the objection—why we have compulsory counterclaims.

THE COURT: I will tell you, in all candor, I do not know if that same principle of compulsory counterclaim operates in the Court of Appeals where one appeal is dismissed because of a second question which may usurp and render moot the first appeal. I will tell you, in all candor, I do not know the answer to that question; whether, because of that action, they are indeed now barred from re-raising the same question that was once raised, but was dismissed because of a second issue which at least I think they thought if successful on, would have rendered moot the necessity to further—well, the argument was already had on that point—to decide that question. I do not know the answer to that, frankly. Judge Posner I am sure does, and the other appellate judges do; but, I mean, as a matter of logic, it would not seem to me that it is akin to a compulsory counterclaim if, indeed, they took that action not because they wanted to avoid the decision on the original question of whether there was a manifest disregard of the law, but rather that there was another issue that developed which would have let them win and not have to have, let us say, won on the first question before they got what they were seeking. That was to have the award vacated in the first instance.

So if, after that discussion, it is appropriate for me to set a bond in this case, then I am going to set it in the amount of—and I am going to ask you to get together on your figures because I cannot believe there should be at least some hundred thousand dollars apart, given the judg-

ment and given what the Seventh Circuit says is how we compute interest to this point.

MR. RIEGER: Your Honor, I think the difference, if I may speak—my calculation used the amount of the judgment, $11,500,923, and followed the rule by adding 11% to it plus $250. I think what Mr. O'Laughlin may be doing is adding some 9% post-judgment interest to date on top of that total I gave you.

THE COURT: Is it right for him to do that?

MR. RIEGER: I would say if that is what he has done, it is wrong because the rule says that the supersedeas bond should be in the amount of the judgment, and the judgment does not include post-judgment interest.

THE COURT: Can I ask you to get together and see if you can resolve that question among yourselves?

MR. O'LAUGHLIN: He really puts the issue squarely. I am looking over his notes there and we both start with an $11,500,000 judgment. I include interest at 9% from November 19th, 1981, until this very minute—

THE COURT: Which is what the Court of Appeals [said] we should do it from, right?

MR. RIEGER: The Court of Appeals said, your Honor, as I understand the opinion, that the 9% interest will be added to the amount of the judgment until paid.

MR. O'LAUGHLIN: Well, certainly I am entitled to be secured for the full amount that is owed to Merit Insurance Company, plus 11%; and that, if the Court please, comes to $13,904,000, plus 11%. I said yesterday, and I say again, that in my opinion a bond of $15,500,000 is the minimum that should be accepted.

THE COURT: I do not know what the amount of the bond should be. The real question is: Should it be the

judgment plus some interest factor, at least as of the time when the bond was set? I do not think I am supposed to calculate into the future—am I—in order to set a bond?

I mean, you got another $2 million in the proposition someplace, and I take it—

MR. O'LAUGHLIN: $2,375,000.

THE COURT: I take it that is because of what you compute to be some time necessary. What is that difference?

MR. O'LAUGHLIN: That is the judgment of $11,500,000—which your Honor entered—plus interest at 9% to this very day.

THE COURT: You said that was $13 million-something?

MR. O'LAUGHLIN: That comes to $13,876,000.

THE COURT: How do you get to 15.5?

MR. O'LAUGHLIN: I come to 15.5 because your Honor takes 11% of that and adds it for the interest and costs and damages from here on forward. That is provided by local rule.

THE COURT: I will tell you what. I am going to set some bond in the amount greater than $10 million, and I think less than $15 million, but I am not sure of that. You can each submit to me contemporaneously what your justification for what the amount of the bond is. I do not think that will infringe in any way or impair you in your ability to go ahead and appeal whatever it is you are appealing from—both the judgment and the denial of the motion, I take it.

MR. RIEGER: Right.

THE COURT: And then after I look at that, I will decide what the amount is. But you both agree that it is somewhere in the neighborhood of 12 to 15—

MR. O'LAUGHLIN: 15.5.

THE COURT: You are only three million apart. So, that is small change compared to what we have been fighting about—or you have been fighting about—in this case.

So, I do not know the answer to that, frankly, and I am not going to sit here and pretend that I do know the answer.

MR. RIEGER: Your Honor, could we give you that Monday morning?

THE COURT: Sure, sure.

MR. RIEGER: And we will file our notice of appeal this afternoon. I am assuming now that there is at least a stay until your Honor sets the bond, as far as any execution.

THE COURT: I suppose that is fair.

MR. O'LAUGHLIN: Wishful thinking.

THE COURT: Whose execution are we talking about?

Okay. Well, I will do that. You send me anything you want me to look at and we will figure it out. Maybe we will take the current lottery figure and set that as the bond. It will probably be as close as anything. Okay?

MR. O'LAUGHLIN: Thank you, your Honor.

MR. RIEGER: Thank you, your Honor.

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joene Hanhardt
Official Court Reporter

April 2, 1984

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date 3-16-84

Title of Cause Merit Insurance -v- Leatherby Insurance

Brief Statement of Motion ruling on dfts mo/vacate, alter or amend judgment, ruling on dfts mo/stay of execution of judgment.

Ruling held. Defendant's motion to vacate, alter or amend the judgment is denied. Execution on the judgment is stayed until the bond question has been resolved.

/s/ *Kocoras*
Judge

APPENDIX E

Per Curiam Opinion

JUDGMENT — WITHOUT ORAL ARGUMENT

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 4, 1984.

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

MERIT INSURANCE COMPANY,

Plaintiff-Appellee,

No. 84-1427 vs.

LEATHERBY INSURANCE COMPANY, a/k/a WESTERN EMPLOYERS INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-6758
Charles P. Kocoras, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the appeal is DISMISSED, with costs, and with instructions, in accordance with the opinion of this Court filed this date.

APPENDIX F

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 4, 1984

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

MERIT INSURANCE COMPANY,

Petitioner-Appellee,

No. 84-1427 vs.

LEATHERBY INSURANCE COMPANY, a/k/a
WESTERN EMPLOYERS INSURANCE COMPANY,

Respondent-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 6758
Charles P. Kocoras, *Judge*.

ORDER

On May 21, 1984, respondent-appellant Leatherby Insurance Company filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX G

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

June 7, 1984

Mitchell S. Rieger, Esq.
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606

RE: Leatherby Insurance Company a/k/a
Western Employees [sic] Insurance Company
v. Merit Insurance Company
No. A-994

Dear Mr. Rieger:

Your application for a stay in the above-entitled case has been presented to Justice Stevens, who has endorsed thereon the following:

"Deny
John Paul Stevens
June 7, 1984."

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By */s/ Katherine Downs*
Katherine Downs
Assistant Clerk

gtb
cc: Robert A. Holstein, Esq.
Steven G. M. Stein, Esq.
Charles L. O'Laughlin, Esq.

APPENDIX H

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
November 1, 1982
Before
Hon. William J. Bauer, Circuit Judge
Hon. Oscar H. Davis, Judge*
Hon. John L. Coffey, Circuit Judge

MERIT INSURANCE COMPANY,
Plaintiff-Appellee,

No. 81-3053 vs.

LEATHERBY INSURANCE COMPANY, a/k/a
WESTERN EMPLOYERS INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 6758
Charles Kocoras, Judge

This matter comes before the Court for its consideration upon the following documents:

1. The "APPELLANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO REMAND" filed herein on September 14, 1982.

2. The "APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO REMAND AND MOTION TO DEFER FURTHER PROCEEDINGS OR TO STAY ANY RULINGS" filed herein on September 17, 1982.

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* Of the United States Court of Claims, sitting by designation.

On September 10, 1982, the district court entered an order in this case granting respondent-appellant Leatherby Insurance Company's request for relief from judgment and on October 15, 1982, the district court denied petitioner-appellee Merit Insurance Company's motion to reconsider or vacate the order of September 10, 1982. These orders by the district court were entered after the notice of appeal had been filed in this case.

We have held that district courts may reach the merits of motions filed under Rule 60(b) of the Federal Rules of Civil Procedure while an appeal is pending and before the filing of the appellate court opinion. *Washington* v. *Board of Education,* 498 F.2d 11, 15-16 (7th Cir. 1974). Under the approved procedure, however, the district court may either deny the motion on the merits without seeking leave to do so from this Court or, if disposed to grant the motion, certify its determination so that a motion for remand of the pending appeal may be favorably entertained in the Court of Appeals.

We construe the district court's orders of September 10 and October 15 as a certification of the district court's determination that it is disposed to grant the motion under Rule 60(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED, therefore, that the instant case be REMANDED to the district court so that the orders of September 10 and October 15 may be re-entered. Upon notification from the Clerk of the District Court that these orders have been re-entered, the Clerk of this Court will dismiss the appeal.

APPENDIX I

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1982

Before
Hon. William J. Bauer, Circuit Judge
Hon. Oscar H. Davis, Judge*
Hon. John L. Coffey, Circuit Judge

MERIT INSURANCE COMPANY,
Plaintiff-Appellee,

No. 81-3053 vs.

LEATHERBY INSURANCE COMPANY, a/k/a
WESTERN EMPLOYERS INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 6758
Judge Charles Kocoras

On consideration of this Court's November 1, 1982, order in this appeal and having received the re-entered orders from the district court,

IT IS ORDERED that this appeal is hereby DISMISSED.

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* Of the United States Court of Claims, sitting by designation.

APPENDIX J

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date November 19, 1981

Title of Cause—Merit Insurance Co. vs Leatherby Insurance Co.

ORDER

The petition of Merit Insurance Co. to confirm the arbitration award of $10,675,000., which was made on December 1, 1980 is granted. The motion of respondent Leatherby Insurance to vacate, to modify, or to correct the award is denied. This judgment confirming the award incorporates interest on the award as computed per annum from December 1, 1980 at the rate of 8%. (DRAFT)

/s/ Kocoras, J.

APPENDIX K

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date December 16, 1981

Title of Cause—Merit Insurance Co. vs Leatherby Insurance Co.

Ruling on motion to vacate or amend judgment order

Ruling held. For the reasons stated in open court on December 16, 1981, the motion of the respondent Leatherby Insurance Co. to vacate, alter or amend the judgment entered on November 19, 1981 is denied. Bond for appeal set at 12.8 million dollars.

/s/ *Kocoras, J.*

APPENDIX L

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date September 10, 1982

Title of Cause—Merit Insurance Co. -v- Leatherby Inc.

Ruling

For the reasons given in open court, the motion of defendant Leatherby Ins. Co. for relief from judgment under Fed.R.Civ.P. 60(b) is granted. The orders of this court dated November 19, 1981 and December 16, 1981 confirming the arbitration award are hereby vacated. The arbitration award of December 1, 1980 is vacated. The findings and conclusions state[d] in open court will stand in lieu of a written opinion, and no written opinion will issue.

/s/ Kocoras J.

APPENDIX M

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 80 C 6758 Date November 4, 1982

Title of Cause—Merit Insurance Co. -v- Leatherby Insurance Co.

Order

Pursuant to the U.S. Court of Appeals for the Seventh Circuit's order dated November 1, 1982: For the reasons stated in open court on September 10, 1982, the motion of defendant Leatherby Ins. Co. for relief from judgment under Fed.R.Civ.P. 60(b) is granted. The orders of this court dated November 19, 1981 and December 16, 1981 confirming the arbitration award are hereby vacated. The arbitration award of December 1, 1980 is vacated. The findings and conclusions stated in open court will stand in lieu of a written opinion, and no written opinion will issue.

/s/ Kocoras, J

APPENDIX N

Petitioner Leatherby Insurance Company's affiliates, which are subsidiaries of its parent corporations as named at p. ii, but excluding the subsidiaries of the affiliates, are as follows.

*The Continental Group, Inc. wholly-owns**:

CCC Canada Holding, Inc.
CCC Finanz A.G. (Switzerland)* (70-100% owned)
Continental Can Company, Inc.
Continental Energy Corporation
Continental Financial Services Company
The Continental Group of Europe Inc.
Continental Group Overseas Finance, N.V. (Netherland, Antilles)
Covent Insurance Company Limited (Bermuda)
Europemballage Corporation
Richmond Corporation (inactive)
Rock Ledge, Inc. (inactive)
The Vinoxen Company, Inc.* (80% owned)
Continental International Sales Corporation
Forest Energy Resources Company
Cononet Telecommunications, Inc.
Southern Community Development Corp.
Sugar Mill Ventures, Inc. (in dissolution)
Biorex Ltd.

Continental Financial Services Company wholly-owns:

Continental Equivest, Inc.
Continental Land Sales, Inc.
Continental Land Title Co.
Insurance Management Corporation of Florida
Ft. Myers Insurance Agency, Inc. (dormant)
The Life Insurance Company of Virginia
Lawyer's Title Insurance Corporation
Western Employers, Inc.
Buttonwood Marketing Corp.

Life of Virginia Security Sales, Ltd.
Life of Virginia Series Fund, Inc.
DANAC Real Estate Investment Corp.
SEC Computer Company
Investicon, Inc.
Investors Mortgage Insurance Company
Investors Conduit Corp.
Investors Mortgage Financial Services, Inc.
Investors Mortgage Capitol Corp.
Investmor Securities Corp.

Western Employers, Inc. wholly-owns*:

Western Employers Insurance Company (petitioner)
Western Risk Management, Inc.
Park View Insurance Service, Inc.
Leatherby Insurance Service, Inc. (dormant)
Leatherby Insurance Company (dormant)
Eagle Reinsurance, Ltd.* (33⅓% owned)
Hewitt, Coleman & Associates, Inc.
Hoskins and Weckerle, Inc.
Western Employers Insurance Company of America